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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROLAND SPONGBERG,

Plaintiff and Appellant,

v.

FIRST SOURCE WYOMING, INC., et al.,

Defendants and Appellants.

B213442

(Consolidated w/B214884)

(Los Angeles County

Super. Ct. No. VC046736)

APPEAL from an order of the Superior Court of Los Angeles County.

Raul A. Sahagun, Judge. Affirmed.

Smith, Chapman & Campbell, Steven C. Smith and Douglas M. Campbell for  
Plaintiff and Appellant.

No appearance for Defendants and Appellants.

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Plaintiff Roland Spongberg appeals from a trial court order sustaining a demurrer without leave to amend to his causes of action for fraud and negligent misrepresentation alleged against defendants Geostar Corporation (Geostar) and First Source Wyoming, Inc. (FSW).

We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

“Because this matter comes to us on demurrer, we take the facts from plaintiff’s complaint, the allegations of which are deemed true for the limited purpose of determining whether plaintiff has stated a viable cause of action. [Citation.]” (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

#### *Plaintiff’s Second Amended Complaint*

Plaintiff initiated this action on June 1, 2006. According to plaintiff’s second amended complaint (SAC), he “previously invested in securities offered by Defendants who provided the returns promised, provided Plaintiff with regular and detailed accountings as to the value of his investment, as well as the companies[’] activities, and finally, timely notified Plaintiff of his right to convert his investment into restricted shares of” Gastar Exploration, Ltd. (Gastar), a publicly traded company.

In November 2001, defendants’ representatives met with plaintiff “for the express purpose of soliciting” his investment in “working interests in coalbed methane wells.” This investment opportunity is referred to in the pleading as the program. Defendants made certain representations to plaintiff, and in reliance upon those representations as well as defendants’ past performance, plaintiff invested in the program by executing a conversion agreement and a subscription agreement. Both agreements were attached to the SAC as exhibits.

Plaintiff claimed that on multiple occasions, both before and after the date set forth in the conversion agreement, he attempted to exercise his right to convert his interest in the program to Gastar stock. One of defendants’ representatives, who plaintiff could not identify, assured plaintiff that he would notify him when it was time to file his election and exercise his conversion rights and would send him the appropriate documentation.

But, that unnamed person had no intent to do so. Rather, defendants intended “to dissuade” plaintiff and “ensure that he did not timely exercise his right to convert.”

Thus, on September 22, 2004, a Geostar representative indicated to plaintiff for the first time that, contrary to prior representations, plaintiff had failed to properly exercise his right to convert his shares in the program for shares of Gastar stock. Plaintiff was never able to exercise his right to convert his shares in the program into Gastar stock, causing plaintiff to suffer monetary losses. Specifically, from the date of his exercise of his election to convert his shares in the program to September 22, 2004, Gastar stock tripled in value.

Based upon these allegations, plaintiff pled causes of action for (1) fraud and deceit, and (2) negligent misrepresentation.<sup>1</sup>

*Defendants’ Successful Demurrer*

Defendants demurred to the first and second causes of action of the SAC. First, they reminded the trial court that it had previously sustained their demurrer to plaintiff’s fraud claims pled in his first amended complaint. Then, they argued why plaintiff’s fraud claims failed as a matter of law. The conversion agreement governed plaintiff’s right to convert his interest in the program into publicly traded stock. According to that agreement, a copy of which was attached to the SAC, these options “were to be exercised at a specified time upon written notice.” In particular, plaintiff could convert his shares into Gastar stock during the 19th month following the date of his investment only by written notice. Moreover, both the subscription agreement and the conversion agreement provided that they constituted the “entire agreement” between the parties; any amendment must be made in writing.

According to defendants, plaintiff’s fraud and negligent misrepresentation claims failed because, in violation of the parties’ agreements, they were based upon plaintiff’s alleged “reliance on a subsequent oral modification of the Conversion Agreement made

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<sup>1</sup> He also alleged a claim for breach of the subscription agreement, on the theory that defendants failed to pay him the guaranteed minimum return on his investment.

by an unknown representative of one of the Defendants.” Moreover, these two causes of action were not pled with adequate specificity. Plaintiff could not name the alleged unknown representative who made a fraudulent representation to him; plaintiff was unable to identify the representative’s employer, let alone his authority to speak for the corporate defendant. He was also unable to allege whether the representation was oral or written. Furthermore, plaintiff did not, and could not, allege that he gave proper or timely notice to defendants to exercise his conversion rights, as required by the conversion agreement. In addition, defendants argued that plaintiff’s negligent misrepresentation cause of action failed because no cause of action for negligent false promise exists under California law.

Finally, defendants asserted that plaintiff should be denied leave to amend.

Plaintiff opposed defendants’ demurrer, claiming that he had pled his fraud cause of action sufficiently; that he justifiably relied on defendants’ promise that they would notify him when to file his election to convert his shares in the program into Gstar stock; and that his claim for negligent misrepresentation was valid.

After entertaining oral argument, the trial court sustained defendants’ demurrer without leave to amend. The trial court’s order provides: “The causes of action for fraud and negligent misrepresentation have been the subject of two prior demurrers. In its May 2, 2007 order, the Court set forth the defects with . . . those causes of action. The additional factual allegations do not cure those defects.

“Plaintiff alleges that defendants orally promised to notify plaintiff when to file his election and that their failure to do so was fraudulent. See SAC, ¶ 14. However, the subject agreement states that any waiver or amendment of a provision therein must be in writing. Exh. B, [¶][¶] 10, 11. The reliance on a subsequent, oral modification cannot be deemed justifiable. [Citation.]

“Additionally, a cause of action based on promissory fraud must be supported by allegations of nonperformance as well as facts from which an intent not to perform can be inferred. [Citation.] Plaintiff has not pled facts to support a reasonable inference that the unnamed representative made a representation which [changed] plaintiff’s contractual

requirement that the exercise of an option be made in writing within the time specified in the agreement. [¶] . . . [¶]

“Plaintiff has not demonstrated a possibility of amending the pleading, nor set forth any persuasive legal authority that the alleged oral promise is actionable under either a fraud or misrepresentation theory. Accordingly, the demurrer is sustained without leave to amend.”

*Fourth Amended Complaint; Trial; Judgment; Appeal*

At some later point, plaintiff filed a fourth amended complaint, alleging claims for breach of contract, rescission (repudiation); and rescission (failure of consideration). The case proceeded to a jury trial. On November 3, 2008, the jury returned a verdict in favor of plaintiff and against defendants, awarding plaintiff damages in the amount of \$681,450. Judgment was entered, and defendants filed a notice of appeal. Shortly thereafter, plaintiff filed his notice of cross-appeal challenging the trial court’s order dismissing the fraud and negligent misrepresentation causes of action.

On August 10, 2009, this court dismissed defendants’ appeal for failure to comply with trial court postjudgment orders.

## **DISCUSSION**

### *I. Standard of Review*

“Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: ‘On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed “if any one of the several grounds of demurrer is well taken. [Citations.]” [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by

amendment. [Citation.]’ [Citations.]” (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043–1044.)

## II. *The Trial Court Properly Sustained Defendants’ Demurrer*

Unquestionably, the trial court properly sustained defendants’ demurrer without leave to amend, for at least two reasons. First, defendants’ fraud and negligent misrepresentation causes of action were not pled with adequate specificity. The prima facie elements of a cause of action for fraud are (1) a misrepresentation (false representation, concealment, or nondisclosure), (2) knowledge of falsity, (3) intent to defraud, i.e., to induce reliance, (4) justifiable reliance, and (5) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The elements of negligent misrepresentation are similar, but this tort does not require scienter or intent to defraud. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.)

Notwithstanding the policy of liberal construction of the pleadings, fraud and negligent misrepresentation claims must be pled with specificity. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 645; *Small v. Fritz Companies, Inc., supra*, 30 Cal.4th at p. 184.) Thus, “[e]very element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made.’ [Citation.]” (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.) This particularity requirement for fraud “necessitates pleading *facts* which ‘show how, when, where, to whom, and by what means the representations were tendered.’ [Citation.]” (*Ibid.*)

In a fraud action against a corporation, the plaintiff has an even heavier burden. In such a case, the plaintiff must “allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.” (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) General or conclusory allegations of fraud will not suffice. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 645; *Small v. Fritz Companies, Inc., supra*, 30 Cal.4th at p. 184.)

As the trial court found, plaintiff's claims here were not pled with adequate specificity. Plaintiff does not, and apparently cannot, allege who told him that defendants would advise plaintiff when to file his election to convert his shares and would provide him with the appropriate documentation. Plaintiff does not, and seemingly cannot, even allege for which defendant this phantom representative worked, FSW or Geostar. Plaintiff concedes this deficiency in his SAC, referring to "[d]efendants['] representative, who Plaintiff cannot now identify." And, does this person have the authority to speak on behalf of either of the two defendants? Was the representation made orally or in writing? When was the representation made? Despite having alleged fraud and misrepresentation claims in the original complaint, the first amended complaint, and the SAC, all of these questions remain unanswered.

Second, plaintiff's allegations conflict with the plain terms of the conversion agreement. As set forth above, when reviewing an order sustaining a demurrer without leave to amend, the appellate court must assume the truth of all properly pleaded material facts. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We may also take notice of exhibits attached to the complaint. Although we take the factual allegations of a pleading as true, courts do "not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) If the provisions of the exhibit are inconsistent with or contradict the allegations of the complaint, the facts in the exhibit control. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

Here, the conversion agreement provides: "In the event [plaintiff] elects to convert [his] working interest in FSW for shares of Gastar stock, he . . . shall notify [FSW] in writing anytime during the nineteenth (19th) month following the date of the investment of his . . . election to convert. [Plaintiff] shall then execute the appropriate documentation presented by [FSW]." As plaintiff so much as admits in the SAC, he did not comply with this contractual provision. There is no allegation in the SAC that plaintiff notified FSW *in writing* of his intent to convert his shares in the program into

Gastar stock. While he alleges that he did notify “[d]efendants of his intent to convert to shares of Gastar on multiple occasions,” he never indicates that he did so in writing. Absent this requisite factual allegation, plaintiff’s claim must fail as a matter of law.

For the first time on appeal,<sup>2</sup> plaintiff relies heavily upon *Small v. Fritz Companies, Inc.*, *supra*, 30 Cal.4th 167 and argues that his claim for “induced forbearance” is adequate. Albeit confusing, plaintiff’s argument appears to be as follows: Plaintiff did not have to comply with the written terms of the conversion agreement and provide timely written notice to defendants that he sought to convert his shares in the program to Gastar stock because defendants’ unidentified representative induced him not to take action. In light of the vagueness and incomplete nature of plaintiff’s fraud and negligent misrepresentation causes of action, we cannot agree. While a claim for induced forbearance may exist under California law, nothing in *Small v. Fritz Companies, Inc.*, excuses a plaintiff from the specificity requirements of pleading.

To the extent plaintiff suggests that the conversion agreement was amended by the unidentified representative’s representation that he would notify plaintiff when to file his election, plaintiff’s claim is unavailing. The conversion agreement requires all amendments to “be in writing, signed by the Parties.” That did not occur here.

Finally, plaintiff has not shown that any of the defects could be cured if he were granted leave to amend. Thus, the trial court did not abuse its discretion in denying him leave to amend and file yet another pleading.

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<sup>2</sup> Generally, we do not consider arguments first raised on appeal. (*Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131.)



### **DISPOSITION**

The order of the trial court is affirmed. Defendants are entitled to costs on appeal as to plaintiff's appeal.

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\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
CHAVEZ